

*United States v. Cote*, No. 05-30519

**AUG 30 2006**

Reinhardt, Circuit Judge, concurring and dissenting:

**CATHY A. CATTERSON, CLERK**  
**U.S. COURT OF APPEALS**

Tina Cote did not embezzle, steal, or knowingly convert to her own use the funds of the Confederated Salish and Kootenai Tribes of the Flathead Nation. Rather, she enticed tribal members to apply for enforceable and secured loans from the tribal credit office, and then took money *directly from those individuals*. For that reason, I do not believe that Cote committed a violation of 18 U.S.C. § 1163. *See United States v. Perez*, 956 F.2d 1098, 1101-02 (11th Cir. 1992) (holding that theft from individual tribal members – as opposed to from a tribe or tribal organization – does not fall within the ambit of § 1163). Nevertheless, Cote admitted to a factual basis for her conviction by pleading guilty, did not seek to withdraw her plea in the district court, and does not seek to do so on appeal. Accordingly, her conviction must be affirmed. Still, where there is no actual violation of the statute, whatever the practical realities there can be no associated loss, actual or intended. I would thus hold that the district judge clearly erred in imposing the six-level enhancement based upon a purported loss to the tribe, and would vacate Cote's sentence and remand. In sum, I reluctantly agree with the majority as to the conviction but respectfully dissent with regard to the sentence.